

**10146–10154 INFORMAL SETTLEMENT AGREEMENTS****10146 Nature of Informal Settlement Agreements****10146.1 Generally**

An informal settlement agreement is a Board document providing that the charged party will take certain action to remedy the unfair labor practices deemed meritorious. It requires approval of the Regional Director or, after the record opens and evidence is adduced in a C case trial, an Administrative Law Judge. Unlike a formal settlement, an informal settlement agreement, except as provided in Sec. 10146.7 regarding default language, does not provide for a Board Order or a court decree.

Informal settlement agreements are preferred over non-Board adjustments as a method of resolving meritorious unfair labor practice charges. Consideration of whether to accept an informal settlement, rather than require a formal settlement, should include, inter alia, consideration of whether there is a history of unfair labor practices by the same charged party.

**10146.2 Settlement Agreement Forms**

The standard Agency settlement agreement forms should be used in every case where an informal settlement is proposed. (Form NLRB-4775 is approved by a Regional Director and Form 5378 is approved by an Administrative Law Judge.) These forms are applicable regardless of whether the charged party is an employer or a labor organization. The notice is an integral part of the settlement agreement and should be attached to the settlement agreement form and initialed by the parties who execute the agreement. Any changes to the standard language of the form should be clearly identified in an attachment.

**10146.3 Scope of the Agreement/Reservation of Evidence**

The standard settlement agreement forms contain language regarding the scope of the agreement which expressly provides that the settlement agreement applies only to the specific case involved. The Board held in *B & K Builders*, 325 NLRB 693 (1998), that the “Scope of the Agreement” language is sufficiently specific to avoid the “settlement bar rule” established in *Hollywood Roosevelt Hotel Co.*, 235 NLRB 1397 (1978). In *Hollywood Roosevelt*, the Board held that a settlement, if complied with, will be held to bar subsequent litigation of all prior violations, except where they were not known to the General Counsel or readily discoverable by investigation or were specifically reserved from the settlement by mutual understanding of the parties.

The standard scope of the agreement clause also permits the General Counsel to utilize the evidence obtained in the settled case in the litigation of other cases. The language of the Scope of the Agreement clause should be included in every settlement agreement.

**10146.4 Special Provisions in 10(j) and (l) Cases**

When a 10(j) or (l) injunction has been obtained prior to the settlement of a case, the standard provision for withdrawal of the complaint on execution of the settlement should be altered through an addendum to the settlement agreement form to provide for withdrawal of complaint upon closing of the matter in compliance. Since an interim injunction terminates by operation of law upon the Board's final disposition of a case, postponing withdrawal of the complaint allows the interim injunction to remain in effect until the Regional Office is assured that there has been compliance with the settlement. Such an arrangement ensures that the respondent remains under the legal restraint of the interim injunction, which is enforceable by contempt proceedings. In the event respondent breaches the settlement, the settlement is set aside and the complaint is litigated while the injunction remains in effect. OM 01-62.

In this connection, when settling a case in which a 10(j) or (l) injunction has been obtained, the Regional Office should strike the final sentence in the paragraph "Refusal to Issue Complaint" and substitute the following by an attachment:

The Complaint and any Answer(s) in [the captioned administrative cases and numbers] shall be withdrawn upon closing of these matters on compliance. Respondent agrees not to move to vacate, modify, dissolve, clarify or alter the injunction decree in [caption and case number of the 10(j) or (l) decree] on the basis that this Settlement Agreement has been reached. The closing of these matters on compliance will be considered the final adjudication of these cases before the Board for the purposes of [caption and case number of the 10(j) or (l) decree]. Until these matters have been closed on compliance, the injunction in [caption and case number of the 10(j) or (l) decree] will continue in full force and effect for all purposes.

If a 10(l) decree is obtained prior to the issuance of the ULP complaint, the first sentence should be modified to provide that the charge will remain pending until the case is closed on compliance.

If a respondent is unwilling to accept this language as part of a settlement agreement, the Regional Office should consult with the Injunction Litigation Branch.

**10146.5 Settlements to be Patterned After Board Orders**

In drafting language for a settlement agreement and notice, Board agents should be careful to include language readily understandable to employees that is based on provisions in both Board orders and notices in similar cases. Patterning the settlement agreement after a Board notice alone may result in the omission of important aspects of an appropriate remedy.

### 10146.6 Partial Settlements in a Single Case

Although partial settlements in a single case are not common, Regional Directors have discretion, in appropriate circumstances, to approve such settlements.

(a) *Partial Settlement and Complaint on Other Allegations:* If certain unfair labor practice allegations in the same charge are not resolved by the settlement and these remaining allegations are being, or will be, processed further, the settlement agreement should specifically exclude these allegations from the agreement. For example: “This settlement does not remedy the allegation [that John Doe was terminated by the Charged Party on or about January 2, 20\_] or [that the Charged Party failed to process John Doe’s January 2, 20\_\_ grievance for reasons that are arbitrary, invidious and discriminatory].” Additionally, the settlement should provide that the evidence bearing on the settled allegations may be introduced at any hearing on the unsettled allegations. In the case of a partial unilateral settlement, the portion of the charge that is settled must be dismissed. Sec. 10150.

(b) *Partial Settlement and Dismissal of Other Allegations:* If the charged party agrees to settle all allegations of a single charge deemed meritorious and other allegations of the same charge are dismissed, the settlement should not normally be approved prior to the expiration of the appeal period for the dismissed allegations, if no appeal is filed, or the denial of the appeal on the dismissed allegations. If the appeal is sustained, the Regional Office should attempt to include in the settlement the allegations found meritorious on appeal. If such efforts fail, the charged party is still willing to be a party to the partial settlement, and the Regional Director concludes that under all the circumstances it would be appropriate to approve the partial settlement, refer to procedures set forth in paragraph (a) above. Otherwise, all meritorious allegations should be handled together.

### 10146.7 Default Language in Settlement Agreements

Regions should include the following default language in informal settlement agreements where appropriate, such as when there is a substantial likelihood that the charged party/respondent will be unwilling or unable to fulfill its settlement obligations:

(a) *Where Complaint has Issued:*

The charged party/respondent agrees that in case of non-compliance with any of the terms of this settlement agreement by the charged party/respondent, and after 14 days notice from the Regional Director of the National Labor Relations Board of such noncompliance without remedy by the charged party/respondent, the Regional Director may reissue the complaint dated [insert date] in this (or these) case(s). The General Counsel may then file a motion for default judgment with the Board on the allegations of the complaint. The charged party/respondent understands and agrees that the allegations of the reissued complaint may be deemed to be true by the Board and its answer to such complaint shall be considered withdrawn. The charged party/respondent also

waives the following: (a) filing of answer; (b) hearing; (c) administrative law judge's decisions; (d) filing of exceptions and briefs; (e) oral argument before the Board; (f) the making of findings of fact and conclusions of law by the Board; and (g) all other proceedings to which a party may be entitled under the Act or the Board's Rules and Regulations.

On receipt of said motion for default judgment, the Board shall issue an order requiring the charged party/respondent to show cause why said motion of the General Counsel should not be granted. The Board may then, without necessity of trial or any other proceeding, find all allegations of the complaint to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the charged party/respondent, on all issues raised by the pleadings. The Board may then issue an order providing a full remedy for the violations found as is customary to remedy such violations. The parties further agree that the Board's order and U.S. Court of Appeals judgment may be entered thereon ex parte.

(b) *Where Complaint has not Issued:*

The charged party/respondent agrees that in case of non-compliance with any of the terms of this settlement agreement by the charged party/respondent, and after 14 days notice from the Regional Director of the National Labor Relations Board of such noncompliance without remedy by the charged party/respondent, the Regional Director may issue a complaint in this [these] case(s) alleging that the following actions violate the Act:

**[List all meritorious allegations of the charge(s).]**

The General Counsel may then file a motion for default judgment with the Board on the above-described complaint that will issue. The charged party/respondent understands and agrees that the allegations of such complaint may be deemed to be true by the Board. The charged party/respondent also waives the following: (a) filing of answer; (b) hearing; (c) administrative law judge's decisions; (d) filing of exceptions and briefs; (e) oral argument before the Board; (f) the making of findings of fact and conclusions of law by the Board; and (g) all other proceedings to which a party may be entitled under the Act or the Board's Rules and Regulations.

On receipt of said motion for default judgment, the Board shall issue an order requiring the charged party/respondent to

show cause why said motion of the General Counsel should not be granted. The Board may then, without necessity of trial or any other proceeding, find all allegations of the complaint to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the charged party/respondent, on all issues raised by the pleadings. The Board may then issue an order providing a full remedy for the violations found as is customary to remedy such violations. The parties further agree that the Board's order and U.S. Court of Appeals judgment may be entered thereon ex parte.

### **10148 Bilateral Informal Settlement Agreements**

Bilateral informal settlement agreements are entered into by both the charged and the charging party and approved by the Regional Director or an Administrative Law Judge.

#### **10148.1 Conformance of Settlement Agreement and Charge**

If an informal bilateral settlement agreement by its terms does not dispose of all violations alleged, but is nevertheless intended by the parties to be a full resolution, the charge should be amended to conform to the settlement. Alternatively, a sentence should be inserted in the settlement that "This settlement disposes of all unfair labor practices alleged in the charge."

#### **10148.2 Action on Approval of Settlement Agreement**

The Regional Office should promptly inform the parties of the approval of a bilateral settlement agreement and instruct the charged party to immediately comply with it. The charged party, through an attorney or representative, should be requested immediately to take the action called for in the agreement. The charged party should be furnished with sufficient copies of the notice and be given whatever other assistance the Regional Office can render toward carrying out the agreement.

#### **10148.3 Responsibility for Compliance**

The Regional Office is responsible for ensuring compliance with the provisions of settlement agreements.

#### **10148.4 Closing of Case**

When the Regional Director is satisfied that the provisions of the informal settlement agreement have been carried out, including the passage of the notice-posting period, the case should be closed on compliance and the parties should be so notified. The notification should specifically state that the closing is conditioned on continued observance of the terms of the settlement agreement.

**10150 Unilateral Informal Settlement Agreements**

Unilateral informal settlement agreements are entered into by the charged party, but not the charging party, and approved by a Regional Director or an Administrative Law Judge.

**10150.1 Notification to Charging Party**

If the Regional Office anticipates that the charging party may not enter into the settlement, the Regional Office should send to the charging party a copy of the settlement agreement and a letter briefly explaining why the settlement should be approved. The charging party should also be informed that any objections to the settlement, together with supporting argument, should be submitted in writing to the Regional Office within 7 days after service of the letter. This procedure is specifically set forth with respect to postcomplaint settlements in Sec. 101.9(c)(1), Statements of Procedure.

**10150.2 Dismissal of Charge**

If the Regional Director concludes that the charging party's objections do not preclude approving the unilateral settlement agreement, it should be approved and the charge should be dismissed based on the terms of the agreement. The dismissal letter should include a brief statement of the reasons for the approval, address the charging party's objections and contain the standard appeal language. The letter should also include the following paragraph:

In view of the undertakings contained in the attached settlement agreement, it does not appear that it would effectuate the purposes of the National Labor Relations Act to institute further proceedings at this time. I am, therefore, refusing to issue [reissue] complaint in this matter.

A copy of the approved agreement should be attached to the dismissal letter.

**10150.3 Timing for Compliance**

After the expiration of the appeal period, if no appeal has been filed, the Regional Office should instruct the charged party to take the action called for in the agreement. If an appeal has been filed, the instruction is not given unless and until the Office of Appeals has upheld the dismissal. In either case, the responsibility for compliance and the closing of the case should be in accord with the procedures described in Secs. 10148.1–.3.

If the Regional Office learns that the charged party has commenced or will commence performance of the terms of the agreement prior to being so instructed by the Region, the Region should inform the charged party that a determination by the Office of Appeals may require additional remedial action. If additional remedial action is required, the charged party should generally not be required to take any action already performed in compliance with its initial settlement obligations.

**10152 Noncompliance with Settlement Agreements**

If it appears that the charged party is not complying with the settlement agreement, the Regional Office should notify the charged party of this concern and provide it with an opportunity to fully comply.

**10152.1 Settlement Agreements Without Default Language**

With respect to settlement agreements without default language, the charged party should also be advised that failure to fully comply with the settlement agreement will result in the revocation of the approval of the agreement and the issuance or reissuance of the complaint.

Should the above efforts prove unsuccessful, the Regional Director may issue a letter informing the parties of the intention to revoke approval of the settlement agreement. Thereafter, complaint will be issued or reissued, including an Order Revoking Approval of the Settlement Agreement. At hearing, counsel for the General Counsel will have the burden of establishing noncompliance with the agreement, as well as the merits of the alleged unfair labor practices. See Sec. 10146.4 regarding 10(j) and (l) cases.

**10152.2 Settlement Agreements with Default Language**

With respect to settlement agreements with default language, Regions should follow the procedures outlined in Sec. 10146.7.

**10154 Postcomplaint Settlement Agreements and Non-Board Adjustments****10154.1 Settlement Agreement Executed Prior to Opening of Hearing**

Regional Directors have the authority to approve informal settlement agreements executed at any time prior to the opening of the hearing and, on such approval, to withdraw the complaint. Form NLRB-4775 serves both of these purposes. After the settlement agreement is executed, the Regional Office should immediately notify the Division of Judges.

**10154.2 Role of Settlement Judge**

Pursuant to an agreement by the parties, the Chief Administrative Law Judge may assign a judge, other than the trial judge, to conduct settlement discussions and preside over settlement negotiations between the parties. All discussions between the parties and the settlement judge are confidential; the settlement judge does not discuss any aspect of the case with the trial judge. (See Sec. 102.35(b)(1)–(6), Rules and Regulations, Sec. 10351, and OM Memo 95-12 for a complete discussion of the role of a settlement judge.)

**10154.3 Role of Trial Judge in Settlement Efforts**

Before the hearing opens, the Administrative Law Judge assigned to the trial may advise the parties of the importance to the Board of settlements; invite them to take advantage of the opportunity to further discuss settlement; assure them that reasonable

good-faith requests for hearing recesses for the purpose of pursuing settlement will be granted; inform them that settlement efforts will in no way be construed as a sign that their case is weak; and recess the hearing at specific times to urge reconsideration by the parties of the advisability of settling the case.

#### **10154.4 Approval of Settlement Agreement After Hearing Opens**

Where the hearing has opened but no evidence has been introduced, the Regional Director has the authority to approve a settlement agreement. *Sheet Metal Workers Local 28 (American Elgen)*, 306 NLRB 981 (1992). Once evidence has been introduced, but prior to the issuance of a decision, any settlement agreement must be submitted to the Administrative Law Judge for approval. Sec. 101.9(d), Statements of Procedure.

If an agreement is reached after the hearing has been adjourned or is closed, the settlement agreement should be submitted to the ALJ for approval. The ALJ's action is, thereafter, indicated by issuance of an appropriate order and notification to the parties.

If a settlement agreement is approved by the ALJ, counsel for the General Counsel should move for an indefinite adjournment. After compliance has been effected, counsel for the General Counsel should promptly file with the ALJ a motion to withdraw the complaint and close the record.

If a respondent fails to comply with a settlement agreement approved by an ALJ, counsel for the General Counsel should move the ALJ to set aside the settlement agreement and reschedule the hearing.

#### **10154.5 Approval of Withdrawal of the Charge After Hearing Opens**

Where the hearing has opened but no evidence has been introduced, the Regional Director has the authority to approve a request to withdraw a charge. *Sheet Metal Workers Local 28 (American Elgen)*, *supra*.

Once evidence has been introduced but prior to the issuance of a decision, any request to withdraw the charge must be submitted to the Administrative Law Judge for approval. Sec. 101.9(d), Statements of Procedure. If the charge is being withdrawn based on a non-Board adjustment between the private parties and the Regional Office does not intend to appeal the ALJ's approval (Sec. 10154.6), the trial attorney should move for an indefinite adjournment to permit compliance with the terms of the non-Board adjustment. After compliance with the terms of the agreement, counsel for the General Counsel should file with the ALJ a Motion to Approve Withdrawal of the Charge, Dismiss the Complaint and Close the Case. Sec. 101.9(d), Statements of Procedure and Sec. 10275.3.

#### **10154.6 Appeal from Administrative Law Judge's Approval of a Settlement Agreement or Withdrawal of the Charge**

(a) *Appeal from an Administrative Law Judge's Approval of a Settlement Agreement:* If the Administrative Law Judge is presented with a settlement agreement that counsel for the General Counsel opposes, counsel should express on the record the basis for the objection. If the Regional Office determines that it is appropriate to appeal

the ALJ's ruling approving the settlement agreement, the appeal should be promptly filed with the Board pursuant to Sec. 102.26, Rules and Regulations.

(b) *Appeal from an Administrative Law Judge's Approval of a Withdrawal:* If, after the record opens, the private parties reach a non-Board adjustment that the Regional Office does not believe will effectuate the purposes of the Act after considering the factors set forth in *Independent Stave Co.*, 287 NLRB 740 (1987), the reasons for the Regional Office's opposition to the charging party's withdrawal of the charge should be clearly expressed on the record. If the Administrative Law Judge approves the withdrawal over the trial attorney's objection, the trial attorney should consult with the Regional Office to determine whether a request for special permission to appeal the ALJ's ruling should be made to the Board, pursuant to Sec. 102.26, Rules and Regulations. Such an appeal should be filed promptly. In the event the ALJ dismisses the complaint based upon a withdrawal of the charge, a request for review should be filed within 28 days in accordance with Sec. 102.27, Rules and Regulations.

#### **10154.7 Approval of a Withdrawal of the Charge or a Settlement Agreement After Administrative Law Judge Decision**

Although a respondent should be encouraged to comply with an Administrative Law Judge's Order, at times the private parties reach an appropriate non-Board adjustment or an informal bilateral settlement agreement after the issuance of an ALJ's decision while the case is pending at the Board. If the Regional Office determines that such adjustment or settlement effectuates the Act, counsel for the General Counsel should file with the Board a Motion to Remand the Case to the Regional Director for the purpose of approving the adjustment or settlement. The Motion should state the terms of any agreement reached between the parties.